In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 431

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ATLANTA METALLIC CASKET COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM IN BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

This memorandum is filed in response to that part of respondent's opposition to the petition for a writ of certiorari which charges the Board with making misstatements in its petition.

1. Under the headings "Misstatement No. 1" and "Misstatement No. 2" (Opp. pp. 9–10) respondent challenges the accuracy of that part of the Board's petition (pp. 3, 6) which concerns a conversation between Assistant General Foreman Streetman and employee Johnnie Wilson. Respondent accuses the Board of attributing certain anti-union remarks to the foreman instead of to employee Wilson. The petition placed respon-

868120—50

sibility for the remarks on the foreman, in reliance upon the following finding set forth in the intermediate report adopted by the Board (R. 45):

> L. C. Kilgore testified that on or about January 1, 1946, he overheard a conversation between H. D. Streetman, the assistant to the general foreman of the Respondent's sheet metal department and Employee Johnnie Wilson. Kilgore testified as follows:
>
> > H. D. Streetman, and Johnnie Wilson came by within four feet of where I was working, turned up a little alley there. Streetman told Johnnie, says, "Paul Miles and Henry Whitworth and a fellow by the name of Ragsdale and Whitworth and Streetman," he said they wasn't supposed to know anything about they was trying to organize there, and that they had tried to organize once before and they would let it rock along until it got ripe, and then they'd pluck it in the bud. They's squashed it one time, and they could squash it again.
>
> Streetman was not called to testify. Wilson in his testimony did not deny the above related incident. The undersigned credits Kilgore.

It is undisputed that Paul Miles and Ragsdale, referred to in this conversation, were foremen (B. A. 16). The Board's finding quoted above is, we submit, accurately summarized in the peti-

tion for a writ of certiorari as follows (Pet. p. 3):

> About January 1, 1946, while United Steel Workers of America, CIO, herein called the Union, was engaged in an attempt to organize the Company's employees, Assistant General Foreman Streetman informed one of the Company's old employees, Wilson, that he, Streetman, two of the foremen, and Whitworth, a part-time supervisor, were not supposed to know about the Union's organizing campaign; that they would permit it to "rock along until it got ripe, and then they would pluck it in the bud"; that they had "squashed" it on a previous occasion when the Union had attempted to organize the plant and that "they could squash it again" (R. 42, 45; B. A. 15–16).

Respondent, in challenging the accuracy of the statement in the petition for certiorari of the Board's finding, recites other language in the intermediate report, which because the intermediate report was adopted by the Board, must be also regarded as the Board's language. The language relied upon by respondent is merely a reference to the finding already made. In this reference to the finding (R. 53), the intermediate report inadvertently refers to the statement in question as if the employee rather than the assistant general foreman made it. Thus, the intermediate report states: "The undenied testimony

relating to Employee Wilson's report to Streetman wherein Wilson naming Miles, Whitworth and Ragsdale said 'they' were not supposed to know that a union was being organized but that when the time was ripe 'they' would 'squash' it * * * shows the Respondent's knowledge and attitude in the Union affairs of its employees."

This inaccurate reference to the finding which appeared earlier in the intermediate report does not, we submit, nullify or change the finding; nor does it affect the propriety of the Board's conclusion that the statement "shows the Respondent's knowledge and attitude in the Union affairs of its employees" (R. 53) since, one of the parties to the conversation being the Assistant General Foreman, the statement by whomever made, implicated respondent's Foremen Miles and Ragsdale and its Assistant General Foreman Streetman in the scheme to "squash" the Union. The Board's finding in regard to the conversation in question was summarized in the petition for a writ of certiorari merely to show, in accordance with the Board's conclusion, the respondent's knowledge and attitude in the Union affairs of its employees.

2. The alleged misstatement of the Board's finding labelled by respondent as "Misstatement No. 3" consists of a sentence taken out of context from the petition and asserted by respondent to be used "for the obvious unfair purpose of mis-

leading the Court" (Opp. p. 10). The sentence in question is a part of the recital of the circumstances or setting in which respondent's foreman, Miles, questioned an employee, Holcombe, in regard to his union sympathies (Pet. p. 5). The foreman's expression of hostility toward the Union at the time of the questioning was found by the Board not to be unlawful (R. 35) but the questioning was found to be unlawful (R. 51, 53–54). While the sentence in question was probably susceptible of the construction put upon it by respondent, there was obviously no purpose to mislead. For, our petition (p. 9) did in fact indicate what conduct of respondent the Board found violative of the Act when we stated the Board's conclusion that the conduct of Foreman Miles in questioning employee Holcombe about his position in regard to the Union was violative of Section 8 (1) of the Act and did not, in our statement of the Board's conclusions, mention any other conduct of Foreman Miles.

3. Analysis shows that the remaining matters to which respondent objects, although labelled "Misstatements" No. 4, 5, and 6 (Opp. pp. 10–14), are, on the face of respondent's opposition, not actually misstatements either of the Board's findings or of the evidence.

Thus, in connection with the alleged "Misstatement No. 4—Of Own Findings," respondent has taken a sentence in the petition out of its context and asserted that it is an attempt to mislead this

Court into believing that Whitworth was a supervisor at the time he engaged in certain conduct (Opp. pp. 10–11). Aside from the fact that the sentence, by itself, is not misleading, since it commences with the phrase, "Prior to being put in charge of the vault department," a prior sentence of the same paragraph of the Board's petition specifically explains the exact date and circumstances under which Whitworth was put in charge of the vault department and thus became a supervisory employee (Pet. p. 6).

Again, in connection with the alleged "Misstatement No. 5—Of Evidence," respondent takes two sentences in the Board's petition out of their context in the paragraph in which they appear, in order to argue that the Board has misstated or failed to fairly state the evidence (Opp. p. 11). In that paragraph, and preceding the sentences attacked, there is set forth a summary of the occurrences on the day Kilgore was discharged, including the fact that on that day Acting Foreman "Whitworth called Kilgore aside and told him that the men with whom he worked were going to quit if Kilgore did not quit"; then, after a recital of Kilgore's reply and other occurrences on that day (Pet. 7–9), there appear the following statements, including the sentences under attack (Pet. pp. 8–9):

> He [Whitworth] reported to the general foreman, "Kilgore here, I don't know what the trouble is. He's always been on time,

> his work's been satisfactory up to today. Those three men on the * * * big break, has—says they're going to quit if he don't" (R. 56; B. A. 23). Kilgore was then discharged (R. 56–57; B. A. 23). At the hearing, no evidence was introduced to show that any employee had in fact threatened to quit unless Kilgore was discharged (R. 61). Even Whitworth did not so testify, but contended rather that Kilgore was discharged because he did not perform his work properly (R. 60–61; B. A. 93–94).

When the petition stated that "no evidence was introduced to show that any employee had in fact threatened to quit unless Kilgore was discharged," it was referring to the employees with whom Kilgore was working on the day of his discharge ("Those three men on the * * * big break", see Whitworth's report, quoted above) and we think this is clear when the challenged statements are read in their context.

The statements as thus read in their context are correct and proper and none of what respondent asserts to be the evidence is inconsistent with them. Respondent asserts, to prove its point, that there is evidence "that one of the team (Dowda) on whom the weight of the metal was shifted as a result of Kilgore's failure to do his share of the work, threatened to quit." Employee Dowda, however, was not one of the team with whom Kilgore was working on the day of his discharge (R. 56; B. A. 26–27). Although

at one time he had worked on the "break" with Kilgore, he had been transferred from that job to another job a week prior to Kilgore's discharge (R. 57; B. A. 67, 68, 72). Whitworth could not have had reference to this early alleged complaint by Dowda for, as indicated in the quotation above, Whitworth said that Kilgore's "work's been satisfactory up to today."

Likewise, in connection with the alleged "Misstatement No. 6—Of Evidence," (Opp. pp. 11–14), respondent does not show that the Board misstated any evidence in its petition. Respondent, instead, merely recites other evidence which either has no bearing upon the Board's finding under attack or which, at the most, could relate only to the weight of the evidence. See Pet. 3–5.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,
National Labor Relations Board.

JANUARY 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1949